Note: What Light Does the Civil Rights Act of 1875 Shed on the Civil Rights Act of 1964?

The 1964 Civil Rights Act was the first serious anti-racist law to pass the U.S. Congress since a similar, but much less comprehensive law was enacted 89 years earlier, during the First Reconstruction. What sort of struggle led to the proposal and adoption of the 1875 law, how has that law been viewed by historians, what effects did it have, and what parallels and differences were there between the 1875 and 1964 episodes? What can we learn about the Second Reconstruction by comparing it with the First? (See Kousser 1992 for a fuller discussion of the two eras, roughly 1865-1895 and 1950-1990)

Much of the public's attention in 1964, especially in the South, focused on the public accommodations section, Title II of the Act. Would segregation in hotels, motels, restaurants, and theaters, at public meetings, sports events, and governmental offices be swept away? What non-historians may not realize is how similar the provisions of the 1875 Civil Rights Act were to that section of the 1964 Act. Thus, Section 1 of the 1875 Act stated, in pertinent part, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and

applicable alike to citizens of every race and color, regardless of any previous condition of servitude." (U.S. Statutes at Large, vol. 18, p. 335)

The relevant part of the 1964 Act read: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[1] (Title II, Section 201 (a), Public Law 88-352 (July 2, 1964))

In light of the similarities in provisions between the two Acts[2], it is shocking how differently they have fared in history books. The historiography of the 1964 Act is almost wholly celebratory. The real question in the Filvaroff and Wolfinger paper, Chapter 1 of this volume, is: Who will share in the glory of the passage of the 1964 Civil Rights Act? In stark contrast, almost no one from 1875 to the present has asked that question about the 1875 Civil Rights Act. Indeed, much of the historiography of the First Reconstruction has been and still is very antagonistic. To oversimplify, the racist "Dunning School" of historians early in this century thought the First Reconstruction radical, anti-racist, and therefore wrong; whereas, many more recent historians, as strongly against racial inequality

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[1]The differences in these sections of the two laws were chiefly in the greater specificity and detail in the more modern code and the explicit prohibition of segregation (a term not in wide use in 1875) in the 1964 law.

[2]Of course, the 1875 Act was much more limited than the 1964 Act, having no provisions regarding employment, fund cutoffs, or voting. My comparison is meant to be limited to Title II of the 1964 Act.

as the Dunningites were for it, believe the First Reconstruction too conservative and the Reconstructionists either too racist or too insincere, and therefore still wrong. (See Stampp 1965 and Foner 1988 for more balanced treatments)

The 1875 Act's condemnatory treatment by historians was perhaps brought to a height in William Gillette's 1979 book, *Retreat From Reconstruction, 1869-1879.* Gillette's questions about the 1875 Civil Rights Act are essentially: How can we destroy the illusion of idealism? How can we belittle its significance? In a chapter title, he calls it "an insignificant victory;" in a peroration, "little more than the illusion of achievement, the most meaningless piece of postwar [i.e., post-Civil War] legislation." The only reason it passed, Gillette says, was because people expected that it "would never operate effectively." The summation of his chapter on the Act, which is the longest recent treatment by a historian, could hardly be harsher:

> The Republicans, then, had once again indulged in empty ritualism, the results of which were more often negative than constructive. The law such represented the bankruptcy of legislative sentimentality and Reconstruction rhetoric, which demeaned noble ideals and undercut vital interests. For many disillusioned radicals the act was the expiring act of the now obsolete philanthropy. For most other Republicans it was an unwelcome intrusion in an unnecessary initiative. Had great results followed, the cost would have been justified in some measure. But the statute had reaped the whirlwind of racist reaction and it served only to weaken the Republican party, to disappoint the blacks, and to further discredit the integrity of the law. It was the deadest of dead letters. (Gillette 1979, 271, 273, 279)

In other words, in Gillette's view, the 1875 Act was an insubstantial fraud that only

benefited reactionaries who used its shadow to frighten the gullible white masses. Are there any words or sentiments of disapprobation that the historian somehow neglected to include?

In fact, the reputation of the 1875 Act among historians in the 1990s is probably worse than in the 1970s, because political history is so completely out of fashion in the 1990s. A graduate student who would go to work now in political history is considered neanderthal, antediluvian. The cultural history of "texts" -- and anything nonpolitical qualifies as a text -- is the current fashion. Today, most young American historians would not even know of the existence of the 1875 Act, and the few who did would almost surely be ignorant about the struggle that led to the 1875 Civil Rights Act and, indeed, to civil rights acts all over the country in the nineteenth century. For them as well as other audiences, let me recount a few not very well-known facts.

The hub of that struggle was Boston. There, in 1842, the first well-documented movement for a civil rights law in a state legislature took place. (Kousser 1988) After several incidents in which black passengers were excluded from "white" railroad cars, associates of the abolitionist William Lloyd Garrison agitated in the legislature to ban segregated railroad cars by law. The agitation failed to produce a statute only because the railroads in Massachusetts eventually all agreed to eliminate Jim Crow cars and to serve everybody equally.

The more lengthy and difficult campaign for school integration in the Bay State served through newspaper reports and pamphlets as a primer for racial

reformers and their opponents throughout the North. Beginning in 1840 with a petition to the Boston School Committee, black and white Garrisonians pushed to abolish the "colored" schools of that city and to integrate children into schools common to all. When renewed and expanded petition drives in 1844, 1846, and 1849 failed, antislavery forces filed the famous case of *Roberts* v. *Boston* in 1849-50. Before the Massachusetts Supreme Judicial Court, the integrationists were represented by Robert Morris, perhaps the second African-American to be admitted to practice law in the country, and Charles Sumner, the abolitionist Boston Brahmin who would be elected to the U.S. Senate in 1851. Sumner's 80-page brief, which he arranged to have published by Benjamin Roberts, the black printer whose daughter was refused admittance into the white school, contained every argument that has been made in the twentieth century on school integration, except those related to busing, which Sumner was not foresighted enough to anticipate. The abolitionists' defeat at the hands of Chief Justice Lemuel Shaw, who had extensive landholdings below the Mason-Dixon line, only increased the agitation, until in 1855, Massachusetts became the first state in the country to institute a school integration law. Interestingly, the legislature that passed that law virtually unanimously was overwhelmingly dominated by the miscalled "Know-Nothings," who in Massachusetts, at least, were one of the most liberal, anti-racist, and egalitarian groups in the nineteenth century.

In 1865, Massachusetts became the first state to pass a public accommodations law by banning racial discrimination in "any licensed inn, . . .

public place of amusement, public conveyance or public meeting." Nationally, once slavery seemed on the road to ultimate extinction, Sen. Charles Sumner began an assault on segregation that would end only with his death. In 1862 he was largely responsible for an amendment to the charter of the Washington, Alexandria, and Georgetown Railroad which prohibited Jim Crow cars. That action led to the first U.S. Supreme Court case on integration, *Railroad Company* v. *Brown* (1873), in which the majority on the Supreme Court, as liberals often do, decided the issue on the narrowest possible grounds, in this instance, that Sumner's amendment to the railroad charter prohibited segregation. By following proper judicial practice, the Court unintentionally allowed much more conservative courts to sidestep the precedent when they considered the question of whether segregation was violative of common law or the Thirteenth or Fourteenth Amendments.

Sumner first introduced a national civil rights bill in 1867. It passed the Senate in 1872, 1873, and 1874, and finally succeeded in the House in the lame-duck session of 1875 after the Republicans lost 47% of their seats in the 1874 elections, bringing the national phase of Reconstruction largely to an end.[3] In a compromise to obtain the votes of a few marginal members, the Republicans had to delete provisions integrating churches and schools from the bill at the last moment. Nonetheless, it was quite a far-reaching and controversial law.

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[3]This was the third greatest percentage loss by a major political party in American history, exceeded only by Republican losses in the 1890 election (49%) and Democratic losses in the 1894 election (53%). By contrast, in 1994, Democrats lost 21% of their seats.

Not only was it bitterly fought over, but the battle lines correlated perfectly with partisanship. This is one of the chief differences between the civil rights movements of the nineteenth and twentieth centuries. In Congress from 1867 through 1875, no Democrat ever voted for a version of Sumner's civil rights bill. In fact, throughout the whole nineteenth century, no Democratic member of Congress ever voted for a civil rights or voting rights bill. (Kousser 1992, 150-51) In sharp contrast, bipartisan support was crucial to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, as well as to the renewals of the Voting Rights Act in 1970, 1975, and 1982. One reason that civil rights progress was so fragile in the nineteenth century was that Republican proponents could rarely expect any assistance from even a small number of Democrats. The issue marked the clearest line of partisan distinction, and Democrats resisted every advance and repealed every pro-civil rights provision the first chance they got. (To someone steeped in the facts of the nineteenth century struggles, current Republican attacks on minority opportunities raise disturbing parallels.)

Another difference between the movements in the two centuries was that African-American action in the 1870s was much more traditional in its modes than were the sit-ins of the 1960s. To be sure, during the 1860s and 70s, there were a few boycotts of segregated streetcars. But mostly, the newly freed and enfranchised slaves plunged into conventions, conferences, political canvassing, and legal cases -- at least a hundred legal cases in the nineteenth century challenging racial discrimination in schools, for instance. Instead of a Selma

March, blacks in the previous century wrote editorials in their own newspapers, ran for office, and framed antidiscrimination bills themselves.

There were three reasons for this rather surprising difference in the two eras. First, segregation was much less entrenched in the 1870s and race relations were much more fluid. We like to think of ourselves, of course, as living in the only enlightened era that has ever existed, but in many ways things were much worse in the 1950s and 60s -- in particular, segregation had become so much more entrenched that it seemed nearly impossible to overthrow. To do so took drastic and extremely widespread action. Second, blacks were much better connected with the power structure in the 1870s than in the 1960s. They did not need thousands of sit-ins, because they could go right to their (mostly, but not all white) Republican friends, and their Republican friends could pass whatever they wanted to, because they had sufficient majorities in Congress before 1874. Third, the legislative structure was much more malleable; the rules were much simpler and more favorable to reform. Senate rules in the 1870s did not allow filibusters, and although the House permitted much more unlimited debate, it took only a small change in the House rules to cut off discussion and pass the Civil Rights Bill.

The comparative social and political rigidity of the two epochs suggests a third broad contrast. Segregation was so much more ingrained and inflexible in the 1960s than in the 1870s that when the system began to give way, it shattered. Thus, the changes of the 1960s could become much more permanent because they replaced a much more well-defined structure, rather than the comparatively fluid

pattern of race relations of the late 19th century. Likewise, after 1964, the filibuster no longer seemed so formidable a barrier to civil rights bills that they had to be abandoned or severely watered down. 1964 both made racial behavior change rapidly in the South and facilitated further governmentally-sponsored change.

A fourth distinction between the two eras was that the 1875 law, which rested only on the Equal Protection Clause of the Fourteenth Amendment, was ruled unconstitutional by the U.S. Supreme Court, while the 1964 Act, which also referred to the Commerce Clause, passed the Court's muster. (*The Civil Rights Cases* (1883); *Heart of Atlanta Motel, Inc.* v. *U.S.* (1964); *Katzenbach* v. *McClung* (1964)) Perhaps one explanation for the difference in historians' treatment of the two laws is that the 1875 Act did not stay in effect long enough for its direct impact to be unmistakable. Historians celebrate long-lived winners. But in a larger sense, the 1875 Act both reflected and produced smaller victories, for nearly every state in the north and seven of the eleven ex-Confederate states passed similar laws, either as part of the agitation that led up to the national act, as a spinoff from that agitation, or as an attempt to rectify a wrong, at least at the state level, when the Supreme Court invalidated the national Civil Rights Act. In Ohio, for instance, where more school segregation cases were filed in the nineteenth century than in any other state, a comprehensive civil rights bill, which mandated racial integration in public accommodations and schools and lifted the previous ban on interracial marriages, passed in 1887, the end result of protests against the Supreme Court decision in *The Civil Rights Cases*.

A fifth contrast is that the two laws were passed at different points in the recurring cycles of attitudes about race and government. Both the First and Second Reconstructions witnessed rapid changes in white racial attitudes and behavior. But 1875, we are conventionally told, was near the end of such a period of change, near the 1877 date when history lectures and books typically terminate the First Reconstruction, while we know from survey research that a substantial liberalization of white racial attitudes continued long after 1964. (Schuman, Steeh, and Bobo 1985) In fact, northern white views and actions continued to alter in a liberal direction long after 1877, although southern white opinions generally did not. (Kousser 1986; 1991) Conversely, most of the changes in white attitudes since 1964 have been confined to the South. Thus, the contrast between the centuries may not be so stark as suggested, depending on which region one concentrates on.

A similar caution holds for comparisons between the two eras' degrees of governmental action. Both laws came in periods of activism, the Civil War and Reconstruction period being in many ways the greatest period of governmental accomplishment in America since 1787. 1875 was at the end of a period of national, but certainly not state-level energy. 1964, on the other hand, was the apogee of its period's activism, particularly at the national level. Both Reconstructions helped to bring about periods of reaction which reached their height about 30 years after what might be called "High Reconstruction."[4] But that

[4]*Plessy* v. *Ferguson* was decided in 1896, 30 years after Congress passed the Fourteenth Amendment. Right-wing Republicans took over Congress in 1994, 30 years after the passage of the Civil Rights Act, Medicare, and the War on Poverty. The

is what we pay for moments of liberal change that come so infrequently in American history.

The dissimilarities in the causes of the moments of liberal opportunity in the two eras, a sixth contrast, affected their degree of radicalism and perhaps the permanency of their results. It is often some disastrous miscalculation by conservatives that produces the chance for change. The greatest miscalculation conservatives ever made in the United States was seceding in 1860, which led to quite terrible disasters for them as well as for the country, but also to the end of slavery and the passage of the Fourteenth and Fifteenth Amendments, which could probably not have passed at any other point in American history, including the present.[5] In 1964, by contrast, there was no such conservative debacle or a depression partly caused by inaction by the devotees of laissez-faire, as in 1893 and 1932. At the time of the passage of the 1964 Civil Rights Act, the law could only be a response to a positive movement, the sit-ins and demonstrations in the South and not, as during the First Reconstruction, a response further propelled by conservative mistakes, mistakes that gave Radicals, for a time, a free hand. As the Filvaroff and Wolfinger paper shows, liberals did not have a free hand in 1964, but

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phrase "High Reconstruction" is suggested by "High Renaissance."

[5]President Andrew Johnson's calamitous 1866 campaign against the Radicals reinforced the slaveholders' earlier folly at precisely the right moment. For completely inept and unintended contributions to American liberty, he must rank with the greatest of American presidents.

had to win the support of moderates like William McCulloch and conservatives like Everett Dirksen. The Second Reconstruction was therefore less radical, relative to practices and beliefs of the time, than the First, but also probably more difficult to overthrow, because it was based on a wider political consensus.

Although some of the consequences of both the 1875 and 1964 Acts were unintended, I think Filvaroff and Wolfinger exaggerate when they say that no one in 1964 got what they wanted. In the 1870s, although the threat to pass the Civil Rights bill no doubt lost the Republicans some seats in 1874 and although courts killed the law after less than a decade, it did inspire similar state-level laws, which were very seldom repealed, all over the North in the late nineteenth century. Every former abolitionist knew that the struggle for civil rights for African-Americans was difficult and that every course, even passing a law that they favored, risked failure. In the more successful actions of the 1960s, it seems to me that the winners largely achieved their goals, while the losers accurately predicted what defeat would mean for them and the deeply racist society that they preferred to preserve. Pro-civil rights Democrats and northern Republicans got a remarkably effective bill. Within a year, African-Americans could eat at most restaurants and stay at most motels anywhere in the country, public programs at hospitals and other facilities were pretty speedily desegregated, the fund cutoff provision eventually forced the dismantling of the formal structure of school segregation, and affirmative action greatly increased black employment in governmental and private sector jobs in a rapidly changing economy. Moreover, the Republican conservatives who were

not concerned one way or another with civil rights eventually achieved their goal, a reaction against governmental activism on subjects that they cared more about. The Civil Rights Act of 1964 was not the only or even the most important law that encouraged that reaction, but it helped. Finally, southern Democratic conservatives lost dramatically. The meticulously segregated, thoroughly and openly discriminatory society and polity that they tried to protect withered, and after a generation, the southern Democratic conservative largely vanished, as well, gone with the wind of racial and partisan change.

As we seemingly enter a new world in which government, particularly the national government, withdraws its protections against the vagaries of the free market and the prejudices of a society still firmly controlled by whites, it is appropriate to celebrate the accomplishments of bygone eras and to see whether we can learn more about how society operates and what is politically feasible if we study not one, but two parallel events together.